



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 497 OF 2010**

**IN THE ESTATE OF HELLEN KABON WENDOT (DECEASED)**

**EMMANUEL KIMUTAI WENDOT.....1<sup>ST</sup> APPLICANT**

**MAGDALINE CHEPCHUMBA WENDOT.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**SOLOMON C. RUTO.....PROTESTOR**

**RULING**

1. The Deceased died on 22/06/2006. The Letters of Administration were first obtained by the Protestor after citing the Applicants and other Beneficiaries of the estate. The Applicants were subsequently issued with a Grant of Letters of Administration on 01/11/2018 *vide* a Consent Order reached between the parties herein. The Applicants then filed the Summons for Confirmation dated 16/06/2020. On 23/06/2021, I granted the Applicants leave to amend the Summons for Confirmation. The Amended Summons for Confirmation is dated 16/12/2020, in which the Applicants listed six assets for distribution.

2. Before confirmation, Solomon C Ruto (hereinafter 'the Protestor') filed the Affidavit of Protest dated 27/09/2021, opposing the inclusion of LR No. BARINGO EWALEL/SERETUNIN 641 (hereinafter 'the contested property) among the assets of the Deceased's estate. He depones that he is one of the Plaintiffs in *Nakuru High Court Civil Suit No. 7 of 2003: Charles Chebii and Six Others v Cheptoo Kangogo and Others*, which suit challenges the registration of the Deceased as the proprietor of the contested land and that the Deceased passed on before that suit was concluded.

3. He says that he filed citation proceedings against the Applicants and although he was successful in his citation, there was an error in gazettelement, which erroneously named one Kirote Ole Butu as the administrator. According to the Protestor, before the error could be rectified, the beneficiaries of the Deceased's estate 'surfaced' and filed Summons for Revocation of the said grant. He depones that the said Summons for Revocation was compromised by a consent revoking the grant and stating that the parties herein file a joint Summons for Confirmation of Grant catering to each of their interests.

4. The Protestor says that the said Summons for Confirmation have since been filed and that upon perusing them, he noticed his interests had not been catered for. He depones that upon this realisation, he instructed his Advocates to take directions to facilitate the hearing and determination of *Nakuru High Court Civil Suit No. 7 of 2003*.

5. The Protestor contends that there is a likelihood that if this matter is allowed to proceed, it will further complicate the conclusion of the matter before the High Court if the ownership of the contested property is allowed to devolve to the beneficiaries.

6. In response, the Applicants filed the Affidavit dated 10/11/2021 sworn by Magdaline Chepchumba Wendot, the 2<sup>nd</sup> Applicant herein. She depones that they were not aware of the existence of *Nakuru High Court Civil Suit No. 7 of 2003* and that even if the said suit existed, the same has now abated.

7. She concedes that the Protestor applied for letters of administration after citing them - the Applicants - and that the same was compromised *vide* a consent where they were made administrators. However, she says that upon issuance with the Letters of Administration, the Protestor has never moved the Court to have them be substituted with their late mother. She contends that the estate cannot be held in abeyance because the Protestor's interests have not been expressly stated and that the Protestor has not informed the Court of the position of the High Court matter.

8. She contends further, that once the grant is confirmed, 7 acres will be held in trust by the administrators after which the protestor's claim

can be made even if the grant is confirmed. She deposes that the Protestor has never lived on the subject parcel of land which was divided into two parcels and that the Protestor can only pursue his claim at the Environment and Land Court. She asks that the Protest be dismissed and that the grant be confirmed as drawn.

9. The Protestor filed submissions dated 10/01/2022. He submits that the Protest is merited for four reasons. First, the Protestor argues that the ownership of one of the assets making up part of the Deceased's estate has been challenged before a competent Court. Second, the Protestor states that the said suit has not yet been determined. Third, the Protestor says that he is keen on proceeding with the said suit to its logical conclusion. Lastly, the Protestor says that it is important that this Honourable Court facilitates the Objector's right to be heard in the ownership dispute.

10. The Protestor relies on the cases of *In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR*, *In re Estate of Kabatha Kathemba (Deceased) [2021] eKLR* and *In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR* to the effect that disputes over ownership of an asset forming part of the Deceased's estate ought to be resolved first and before a Court with the requisite jurisdiction.

11. The Protestor submits that the purpose of this Protest is to have the said parcel of land left out of the grant, until its ownership has been determined and if allowed to proceed, the determination of that dispute may take longer and be unnecessarily complicated.

12. He contends that the Affidavit sworn by the 2<sup>nd</sup> Applicant is undated and is therefore fatally defective under the Section 5 of the Oaths and Statutory Declaration Act and ought to be struck out. The Protestor cites the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR*. Regarding costs, the Protestor submits that the same should be awarded to the successful party and relies on the case of *Jasbir Singh Rai & Others v Tarlochan Rai & Another [2014] eKLR*.

13. The Applicants' submissions are dated 03/02/2022. They submit that the Protestor does not have any interest in the estate of the Deceased. They reiterate that the Deceased having died in 2006, the Protestor has not made any effort to substitute the Deceased with the Applicants and the suit has therefore abated. They also submit that since the issuance of the Letters of Grant of Administration on 01/11/2018, the Protestor has never moved the Court in the High Court case and that the Protestor's intention is to hold the estate at ransom.

14. On the issue of the undated affidavit, they submit that the same is dated 10/11/2021 and any undated copy served on the Protestor was unintentional.

15. A copy of the Affidavit filed in Court is dated and the contestations based on the provisions of Section 5 of the Oaths and Statutory Declarations Act does not, therefore arise. Accordingly, the sole issue for determination is whether the Protest has met the threshold for the exclusion of the Contested Property from the schedule of assets and consequently if it should be hived off from confirmation.

16. It is trite that where ownership of an asset of the Deceased is contested, then the distribution of the said asset ought to be delayed and confirmation of the undisputed assets granted to allow beneficiaries to benefit from the undisputed assets. In an ideal situation, the claim by the Protestor would then be filed under the provisions of Rule 41 (3) of the Probate and administration Rules. The rule provides that where it is not convenient to resolve disputes arising in the course of an application for confirmation of a grant, such as identity of persons claiming to be beneficiaries, their share or estate, conditions or qualifications attaching to such share or estate, the court is empowered, before confirming the grant, to await determination of the question in proceedings under Order 37 (1) of the [Civil Procedure Rules](#).

17. However, in this case, the Protestor's claim is that there already exists *Nakuru High Court Civil Suit No. 7 of 2003*, which he intends to revive, if this Court accedes to his prayer to have the contested property excluded from the Summons for Confirmation.

18. The Protestor's position on the matter is untenable for two reasons. First, the Protestor's interpretation of the Consent Order of 01/11/2018 is eminently unsustainable. That Consent Order is worded as follows:

*By Consent, the Grant issued to Petitioner Solomon C. Ruto on 7/5/14 be annulled and the same be issued to Emmanuel Kimutai Wendot and Magdaline Chepchumba Wendot.*

19. The Protestor contends that this consent was recorded on the understanding that the Applicants would cater to "his interests" when applying for confirmation of the grant. The Consent Order was presented to the Court by the Applicants in the presence of the Protestor's Counsel on record, who confirmed it as such. Both in context and text, there is no mention or intimation of the "interests" of the Protestor in that Consent. Had the parties intended that inclusion of the Protestor's interests be addressed in the Consent Order, they would have expressly recorded the Consent as such.

20. Second, is the existence and arguably infrequency of *Nakuru High Court Civil Suit No. 7 of 2003*. The Administrators persuasively argue that the suit has already abated. Indeed, the Protestor does not deny that suit has abated. He aptly puts in his Affidavit of Protest that he intends to "revive that suit". The respective arguments are based on the provisions of Order 24 Rule 4(3) and Order 24 Rule 7(2) of the Civil Procedure Rules, respectively. Order 24, Rule 4(3) provides that a suit abates against a Defendant automatically by operation of the law on the anniversary of his death unless the Plaintiff has taken action to substitute the deceased defendant with his Personal Representative. Order 24, Rule 7(2) gives some relief to a Plaintiff who is adversely affected by such abatement to revive the suit if such a Plaintiff can demonstrate "sufficient reason" for the delay in taking action.

21. In the present case, the Deceased died on 22<sup>nd</sup> June, 2006. That is more than 16 years ago. The Protestor took no action at all to revive that suit. Even if the Protestor was to be granted some latitude for the time spent citing the Beneficiaries herein and obtaining the Grant, he has not shown what effort he has made in reviving *Nakuru High Court Civil Suit No. 7 of 2003* after discovering that his interest was not catered for. Again, as has been stated elsewhere in this Ruling, there was no indication in the Consent Order that the Consent Order was conditional.

22. I find persuasive the reasoning in *Alexander Mbaka v Royford Muriuki Rauni & 7 others [2016] eKLR* where the Court held that a Succession Court can only entertain a claim against the estate of the Deceased upon the person claiming establishing that their claim or right has crystallized. In that case, the Applicant sought to exclude a property based on a Decree that was already time barred.

23. In my view, the correct approach in the present case would have been for the Protestor to first revive *Nakuru High Court Civil Suit No. 7 of 2003*, before seeking to exclude the Contested Property. In the absence of such revival, it would be unjust to deprive the Beneficiaries of an asset based on the assumption that the Protestor will at some later date revive the suit, then apply to substitute the Administrators. In any case, it is not all lost for the Protestor if he is able to revive the suit, he can always seek relief against the administrators of the estate of the Deceased.

24. In the premise, I make the following orders:

**I. The Protest dated 27/09/2021 is hereby dismissed.**

**II. The Amended Summons for Confirmation of Grant will be scheduled for hearing.**

**III. Each party will bear its own costs.**

25. Orders accordingly

**DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2022**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.